DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-21-31,463

In re: 1758 Swann St., NW

Ward Two (2)

SAMANTHA DE SILVA,
Housing Provider/Appellant

v.

HOLLY MARTYN,
Tenant/Appellee

ORDER DENYING MOTION TO STRIKE

May 19, 2023

CARMICHAEL, ADMINISTRATIVE JUDGE: This case is on appeal to the Rental Housing Commission ("Commission") from a final order issued by the Office of Administrative Hearings ("OAH") based on a petition filed in the Rental Accommodations Division ("RAD") of the District of Columbia Department of Housing and Community Development ("DHCD").[1] The applicable provisions of the Rental Housing Act of 1985 ("Act"), D.C. Law 6-10, D.C. Official Code §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. Official Code §§ 2-501-510 (2001), and the District of Columbia

[1] OAH assumed jurisdiction over tenant petitions from the Department of Consumer and Regulatory Affairs ("DCRA"), Rental Accommodations and Conversion Division ("RACD") pursuant to the Office of Administrative Hearings Establishment Act, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2007 Repl.). The functions and duties of RACD in DCRA were transferred to DHCD by § 2003 the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.)).

Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899 (2016), 1 DCMR §§ 2920-2941 (2016), 14 DCMR §§ 3800-4399 (2021)[2] govern these proceedings.

I. PROCEDURAL HISTORY

This matter arises from a tenant petition filed by tenant/petitioner/appellee Holy Martyn ("Tenant") on December 1, 2021. The petition claimed that housing provider/respondent/appellant Samantha De Silva ("Housing Provider") had failed to register the Tenant's rental unit, unlawfully reduced related services or facilities, and unlawfully raised the rent charged. R. at Tab 21. An evidentiary hearing was held on March 4 and 14, 2022 before Administrative Law Judge Vytas Vergeer ("ALJ"), who then issued a final order on August 3, 2022. R. at Tab 7 ("Final Order"). Based on the claimed violations of the Act, the ALJ awarded the Tenant approximately $12,000 in rent refunds and interest.

Crucial to the motion before us now, the Tenant, on August 15, 2022, filed a timely motion "pursuant to [Levy v. D.C. Rental Hous. Comm'n, 124 A.3d 684, 692 (D.C. 2015),] and 1 DCMR § 2828.5(e) requesting that the [OAH] award damages for overpaid rent and reduction in services and facilities that have accrued since the close of the evidentiary hearing." R. at Tab 6 ("Motion for Reconsideration") at 2. The Tenant captioned that motion as a "motion to reconsider" the Final Order, in accordance with OAH Rule 2828, and we use that same term here. The Housing Provider opposed the Motion for Reconsideration, and on September 30, 2022, the ALJ granted the motion in part and denied it in part, awarding additional rent refunds

[2] On December 31, 2021, new rules took effect to amend the applicable chapters of Title 14 of the DCMR. Pursuant to 14 DCMR § 3800.10 (2021), the Commission applies the prior rules to the facts of this case and the amended rules to its procedures on appeal.

for issues where the Housing Provider did not dispute the relevant facts and otherwise leaving the Final Order unchanged. R. at Tab 1 ("Order on Additional Damages").

On October 14, 2022, the Housing Provider filed a notice of appeal with the Commission ("Notice of Appeal"), asserting that the ALJ erred in the Final Order by concluding that the rent was unlawfully increased when the Tenant moved in and that the Housing Provider had not properly notified the Tenant of the registration of the rental unit, at least as of January 4, 2022. On November 4, 2022, the Tenant filed a motion to strike the Notice of Appeal ("Motion to Strike"). The Motion to Strike asks the Commission to dismiss this appeal for two reasons: first, that the Notice of Appeal was untimely because the ALJ found that the Motion for Reconsideration was not actually contemplated by OAH Rule 2828.5, and therefore it did not extend the time to file a notice of appeal under the Commission's rules; and second, that the Commission's rules allow a party to only appeal an order granting reconsideration, and not the original final order, which the Housing Provider does here, if the notice of appeal is not filed within 10 days of original order. The Housing Provider filed an opposition on November 15, 2022 ("Opposition"). We address the Motion to Strike herein and deny it for the following reasons.

II. DISCUSSION

1. Whether the Tenant's Motion for Reconsideration extended the Housing Provider's time to file the Notice of Appeal

Under the Act and the Commission's rules, a notice of appeal must be filed within 10 business days of the final order being appealed. D.C. Official Code § 42-3502.16(h); 14 DCMR

§ 3802.2.[3] Under OAH Rules 2828.4 and 2938.2, a party has 10 calendar days to file a motion for reconsideration and, if any party does so, the "order will not be final for purposes of appeal to the Rental Housing Commission until the Administrative Law Judge rules on the motion." Ten calendar days after the Final Order was issued (plus an intervening weekend), the Tenant filed her Motion for Reconsideration, which was two days before the deadline for any party to file a notice of appeal with the Commission. The Housing Provider did not file her Notice of Appeal until after the ALJ issued the Order on Additional Damages, nearly two months later, but did so within 10 business days of that order being issued.

The Tenant asserts that the Notice of Appeal is untimely because the document that she captioned as the "Motion for Reconsideration" was not, in substance, a motion for reconsideration within the meaning of OAH Rules 2828 or 2938. Motion to Strike at 3. The ALJ apparently thought so, stating:

> Petitioner's motion is more properly considered as a motion for additional damages, as it does not actually challenge any of the holdings in the August 3, 2022, Final Order, other than the total damages. Rather, it asks me to extend those holdings to include damages that accumulated between the date of the hearing and the issuance of the Final Order.

Order on Additional Damages at 2.

The Tenant cites the District of Columbia Court of Appeals' ("DCCA") decision in Nuyen v. Luna, 884 A.2d 650, 654 (D.C. 2005), for the principle that "[t]he nature of a motion does not turn on its caption or label, but rather its substance." In that case, the Superior Court entered a default judgment against a landlord who failed to appear for a hearing and subsequently challenged that judgement by motion and on appeal. The DCCA confronted the

[3] Our review shows that the Final Order was served on the parties electronically, thus the five additional calendar days for service by U.S. mail does not apply.

question of whether the landlord's motion, which he captioned as a Super. Ct. Civ. R. 59(e) motion for reconsideration, was substantively a Super. Ct. Civ. R. 60(b) motion for relief from judgment. The DCCA observed that the landlord's motion "did not base his claim for relief on an error of law; he alleged an additional circumstance not available to the trial court when it granted the default judgment," and accordingly held that it was, in substance, a motion for relief. As a motion for relief, rather than reconsideration, the time to directly appeal the default judgment was not tolled and expired before the landlord filed his appeal to the DCCA.[4]

Analogously to the Super. Ct. Civ. R., the OAH Rules provide for both motions for reconsideration of a final order, which toll the time to appeal, and motions for relief, which do not toll the time to appeal. OAH Rule 2828.5 & 2828.10; *see* OAH Rule 2828.8. The Tenant argues that, in the Order on Additional Damages, the ALJ correctly concluded that the Tenant's Motion for Reconsideration was not, despite its caption and citation to OAH Rule 2828.5, substantively a motion to reconsider. It is not clear what, if any, other OAH Rule the ALJ considered to be applicable to the Tenant's motion. Both OAH Rules 2828.5(e) and 2828.10(b) contemplate motions based on new evidence not available before the hearing, but "relief" only appears warranted when the evidence could not be discovered before the "reconsideration" deadline.

The Housing Provider counters that Nuyen itself notes the overlap between motions for reconsideration and relief. Opposition at 6; Nuyen, 884 A.2d at 655. Nuyen further explained that "[a] motion that is 'proper under either rule' will ordinarily be treated as a [motion for

[4] The Housing Provider argues that Nuyen did not address an issue of timeliness. Opposition at 7. While it is true that court's opinion does not discuss the matter of timeliness at length, its "analysis begins with the proposition that the timely filing of a Super. Ct. Civ. R. 59(e) motion . . . tolls the time for filing an appeal from the original judgment." 884 A.2d at 654. Thus it is implicit that the landlord in Nuyen could not directly challenge the underlying default judgment because his appeal was out of time.

reconsideration]." *Id*. (quoting Wallace v. Warehouse Empls. Union # 730, 482 A.2d 801, 805 (D.C. 1984)). Given the Tenant's captioning of and citations in the Motion for Reconsideration, the Housing Provider argues that failing to toll the appeal deadline would impose an untenable guessing game on the Housing Provider as to what OAH or the Commission might, ex post facto, think the true nature of the motion was. Opposition at 7. We agree.

First, we think that the ambiguity of the Tenant's request should be resolved in favor of reaching the merits of this case and treated as a motion for reconsideration. Wallace, 482 A.2d at 805.[5] The ALJ's statement that the Motion for Reconsideration was "more properly considered as a motion for additional damages" is itself somewhat ambiguous and arguably dicta. The very next paragraph, the start of the "Analysis and Conclusions of Law" section, explains why the Tenant relied on the DCCA's statement in Levy that OAH Rule 2828.5(e) would apply to requests "to more accurately establish damages." Order on Additional Damages at 2 (citing Levy, 124 A.3d at 692).

Second, assuming for the sake of argument that the Tenant's request was not properly considered under OAH Rule 2828.5, we think that basic fairness requires that the Housing Provider's Notice of Appeal be treated as timely. The Commission has previously held that its appeal deadline may be equitably tolled. *See* Dungan v. Gross, RH-TP-14-30,392 (RHC Nov. 23, 2021), at 10. Under the "lulling doctrine," a statutory deadline may be tolled where an affirmative act by one party has reasonably led another party not to act within the required time. Kamerow v. D.C. Rental Hous. Comm'n, 891 A.2d 253, 257-58 (D.C. 2006); *see also* East v.

[5] "The approach of the federal courts, consistent with the policy of liberal construction of the rules, has generally been to consider a motion which is proper under either rule as made pursuant to Rule 59(e) if timely filed under that rule, *see Coleman v. Lee Washington Hauling Co., supra*, 388 A.2d at 46-47 n.5 (permitting the court to reach the merits of the underlying judgment)[.]" Wallace, 482 A.2d at 805.

Graphic Arts Indus. Joint Pension Trust, 718 A.2d 153, 156-57 (D.C. 1998). In consideration of the ambiguous nature of for Tenant's request for additional damages, the applicable OAH Rule, and the Tenant's explicit reliance, citing Levy, on the OAH Rule that would toll the time to appeal, the Housing Provider cannot justly be faulted for waiting to file an appeal until after the ALJ ruled on the Motion for Reconsideration. Equity requires that the Tenant not benefit from, and the Housing Provider be prejudiced by, the Tenant's explicit invocation of the rule that suspends the finality of an order and tolls the time to appeal.

Accordingly, we conclude that the Notice of Appeal was timely filed.

2. Whether the Notice of Appeal violates the Commission's rules by addressing issues in the Final Order that were not amended by the Order on Additional Damages

As explained above, the filing of a motion for reconsideration tolls the start of the time for a party to file a notice of appeal. OAH Rules 2828.4 & 2938.2 (stating that final order "will not be final for purposes of appeal" if any party timely files motion for reconsideration). As recently revised, the Commission's rule at 14 DCMR § 3802.3 provides, in relevant part, as follows:

> 3802.3 The filing of a notice of appeal from a final order removes jurisdiction over the matter from the Rent Administrator or the Office of Administrative Hearings, except as follows:
>
> (a) If a timely motion for reconsideration is also filed:
>
> (1) If the motion for reconsideration of a final order is not granted, the Commission shall not take jurisdiction over the matter, and the time to file a notice of appeal shall not begin to run, until the motion for reconsideration has been denied by order of the Rent Administrator or the Office of Administrative Hearings, or by the expiration of time pursuant to § 3924.2 or 1 DCMR § 2938.1, respectively; provided, that a timely notice of appeal that was filed prior to the denial of the motion for reconsideration need not be refiled[.]

> (2) If the motion for reconsideration of a final order is granted in whole or in part, only the order granting reconsideration shall be final and appealable, and the time to file a notice of appeal shall begin to run from the date reconsideration is granted, regardless of whether a party has filed a notice of appeal prior to reconsideration;

This is the first occasion that the Commission has had to address the applicability of this language. We conclude that subparagraph (2) does not limit the scope of appealable issues here as the Tenant asserts.

The lead-in language of subsection 3802.3 and paragraph (a) provide the context in which subparagraph (2) comes into play: when *both* a motion for reconsider and a notice of appeal are timely filed within the 10-day period after a final order is issued. The purpose of the rule is to provide greater precision about when the Commission's jurisdiction takes effect and when the OAH's jurisdiction ends in a variety of situations, as compared to the more general language of the prior rule. *See* 14 DMCR § 3802.3 (2004);[6] *see generally* Notice of Proposed Rulemaking, 66 D.C. Reg. 9813, 9818 (Aug. 2, 2019).

Taken in isolation, subparagraph (2) could suggest that a party that fails to file a notice of appeal within 10 days waives any appeal rights as to the final order, even though either that party or another party has filed a motion for reconsideration. In context, however, that rule assumes that a party has already filed a notice of appeal from the final order; the limitation that "only the order granting reconsideration shall be final and appealable" applies to any *additional* notice of

[6] From 1986 until 2021, 14 DCMR § 3802.3 provided:

> The filing of a notice of appeal removes jurisdiction over the matter from the Rent Administrator; Provided, that if both a timely motion for reconsideration and a timely notice of appeal are filed with respect to the same decision, the Rent Administrator shall retain jurisdiction over the matter solely for the purpose of deciding the motion for reconsideration, and the Commission's jurisdiction with respect to the notice of appeal shall take effect at the end of the ten (10) day period provided by § 4014 [or 1 DCMR § 2828.4].

appeal that might be filed after the grant of reconsideration. That is, a second notice of appeal, arising from an order granting reconsideration, cannot raise additional issues that could have been raised when an appellant actually filed its first notice. *See, e.g.,* Ahmed, Inc. v. Torres, RH-TP-07-29,064 (RHC Oct. 28, 2014), at n.11.

Here, we have only one notice of appeal from the Housing Provider. The Housing Provider was not required to file her Notice of Appeal within 10 days of the Final Order because, as discussed above, OAH Rule 2828.4 tolled the time to do so when the Tenant filed her Motion for Reconsideration two days before the initial appeal period ended. 14 DCMR § 3802.3 would come into play if the Housing Provider had filed an appeal in that first window, perhaps before or unaware that the Tenant had filed the Motion for Reconsideration. If she had done so, she would have been limited before the Commission to challenging only those issues stated in the original notice. A second notice of appeal would have been necessary to address any issues arising from the grant of reconsideration, if she sought to challenge any. Because she did not file a notice of appeal before the Tenant filed her timely Motion for Reconsideration, the Housing Provider has not limited herself to any specific challenges to the Final Order, and she may therefore address all of the ALJ's determinations in one notice of appeal.

Moreover, an order granting reconsideration will, ordinarily, result in an amended final order that incorporates or reiterates the findings of fact and conclusions of law previously made, with at least some modifications. *See, e.g.,* Torres, RH-TP-07-29,064. Because the ALJ here did not consider this to be an instance of "reconsideration" precisely, the Order on Additional Damages does not reiterate the prior findings and conclusions. But, in our reading, that order relies on and necessarily incorporates all the findings and conclusions in the Final Order. Thus, even if we were to treat the Order on Additional Damages as the only "final and appealable"

order, the Housing Provider must have the opportunity to challenge the underlying determinations made in the Final Order. *See* OAH Rule 2938.2 (deeming orders non-final while reconsideration pending).

Accordingly, we conclude that the Commission's rules do not prohibit the Housing Provider from appealing issues arising from the Final Order.

III. CONCLUSION

For the foregoing reasons, the Tenant's Motion to Strike is **DENIED**. We conclude that the Motion for Reconsideration was either properly filed under OAH Rule 2828.5, which tolls the time to file an appeal, or the Tenant's express reliance on that rule estops her from arguing that the Housing Provider missed the deadline that would have been tolled by it. We further conclude that the Commission's rule at 14 DCMR § 3802.3 does not limit the Housing Provider from appealing determinations made in the Final Order, because those determinations were non-final when the original appeal deadline would have run and became appealable after the Tenant's Motion for Reconsideration was granted in part.

SO ORDERED.

DocuSigned by:
Toya Carmichael
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TOYA CARMICHAEL, ADMINISTRATIVE JUDGE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **ORDER DENYING MOTION TO STRIKE** in RH-TP-21-31,463 was mailed electronically on this **19th** day of **May, 2023,** to:

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